FLOYD COLLINS
v.
ACTING BILLINGS AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 96-23-A Decided January 13, 1997

Appeal from a decision concerning a lease of allotted land on the Wind River Reservation.

Affirmed in part; reversed in part; vacated in part.

1. Indians: Leases and Permits: Farming and Grazing--Indians: Tribal Government: Constitutions, Bylaws, and Ordinances

Under 25 U.S.C. § 3715(b)(1), the Bureau of Indian Affairs is required to implement certain tribal laws which provide preferences to Indian operators in the leasing of Indian agricultural lands. 25 U.S.C. § 3715(c)(3) excepts from this requirement any parcel of trust or restricted land for which the owners of at least 50 percent of the interests therein have filed with the Bureau written objections to the application of tribal law concerning preferences to their land.

APPEARANCES: Appellant, pro se; Harlan Fegler, pro se.

OPINION BY ADMINISTRATIVE JUDGE VOGT

Appellant Floyd Collins seeks review of an October 23, 1995, decision of the Acting Billings Area Director, Bureau of Indian Affairs (Area Director; BIA), concerning a farm/pasture lease for a portion of Allotment 1682 on the Wind River Reservation. For the reasons discussed below, the Board affirms the Area Director's decision in part, reverses it in part, and vacates it in part.

Background

Allotment 1682 is owned in part by the Shoshone and Arapahoe Tribes of the Wind River Reservation (Tribes) and in part by individual Indians. 1/ In November 1991, the Superintendent, Wind River Agency, BIA, advertised for lease a 39-acre tract within the allotment. The tract was described

1/ It appears from various documents in the record that the Tribes own a 16 percent interest in the allotment and that the remaining interests are shared by at least 96 individual owners.

as the NE¼NW¼ (less a 1-acre canal), sec. 16, T. 1 S., R. 2 E., Wind River Meridian, Wyoming. 2/ Harlan Fegler, a non-Indian, submitted the high bid for this tract. He also bid on Allotment 1683, stating that he would like to combine the two tracts and to make improvements to Allotment 1683. He asked that he be granted 10-year leases on both tracts "to make it all feasible." 3/

Fegler's bid was the only one deemed acceptable by the Agency. The Agency therefore asked the Tribes' Joint Business Council (JBC) whether the Tribes wished to award the lease to Fegler or readvertise it. The JBC requested that a 1-year lease be issued to Fegler. Fegler stated that he was not interested in a 1-year lease. He again proposed that he be awarded a 10-year lease with an option to improve adjacent property within Allotment 1683. On September 23, 1992, the JBC approved this proposal. However, because probates of several estates with interests in Allotment 1682 were then pending, it was determined to limit the lease to 2 years. 4/ Fegler agreed to a 2-year lease. Accordingly, he was awarded Lease 2281, with a term beginning January 1, 1993, and ending December 31, 1994. The lease was approved by the Superintendent on July 28, 1993.

So-called "90-day notices" were sent to the landowners of Allotment 1682, apparently on March 17, 1994. 5/ The notice read:

> THIS LETTER IS TO ADVISE THAT YOU MAY NEGOTIATE A LEASE WITH A LESSEE OF YOUR CHOICE, ON THE FOLLOWING DESCRIBED LANDS SUBJECT TO THE CONSENT OF ANY OTHER HEIRS TO THE TRACT. IT WILL BE THE RESPONSIBILITY OF THE LANDOWNERS TO NEGOTIATE FOR THE HIGHEST RENTAL THE MARKET WILL OFFER. LEASES SUBMITTED AT A RATE THAT IS INCONSISTENT WITH THE PREVAILING FAIR MARKET RENTAL VALUE WILL NOT BE APPROVED.

2/ According to a June 27, 1995, memorandum from the Superintendent to the Area Director, the entire allotment consists of 80 acres, described as the N½NW¼, sec. 16, T. 1 S., R. 2 E.

3/ No copy of the 1991 lease advertisement is included in the record. However, Advertisement WR 94-1, discussed further below, states in paragraph 3:

"THE TERMS OF LEASES TO BE GRANTED WILL BE FOR FIVE (5) YEARS UNLESS OTHERWISE SPECIFIED IN THIS BID ADVERTISEMENT. *

"* NOTE: CONSIDERATION MAY BE GIVEN FOR THE ISSUANCE OF TEN (10) YEAR TERM LEASES IF PROSPECTIVE LESSEE SUBMITS AN ACCEPTABLE IMPROVEMENT PROPOSAL * * * WHICH WILL BE SUBJECT TO LANDOWNER AND AGENCY APPROVAL."

4/ Although not entirely clear from the record, it was apparently BIA which made this determination.

5/ This is the date stated in a June 27, 1995, memorandum from the Superintendent to the Area Director and in the Area Director's Oct. 23, 1995, decision.

A sample 90-day notice included in the record bears the number "022894" in the upper left-hand corner. This number could be construed as a date, i.e., Feb. 28, 1994. There is no other number on the form which could be interpreted as a date.

* * * * * *

IN THE EVENT A SATISFACTORY LEASE IS NOT AGREED UPON AND IS NOT SUBMITTED IN ORDER FOR APPROVAL WITHIN 90 DAYS FROM THE DATE OF THIS LETTER, A LEASE MAY BE GRANTED BY THE WIND RIVER AGENCY SUPERINTENDENT FOR AND ON BEHALF OF ALL THE LANDOWNERS, IN ACCORDANCE WITH THE ACT OF JULY 8, 1940 (54 STAT. 745, 25 U.S.C. 380).

On May 23, 1994, the Agency issued Invitation WR 94-1, advertising for lease, inter alia, the NE¼NE¼ of sec. 16, T. 1 S., R. 2 E., which was stated to be within Allotment 1682. This tract was listed as Item 53 on the invitation. Bids on Item 53 were submitted by Fegler and by appellant, who is a tribal member. Fegler's was the high bid. At the bid opening on June 13, 1994, BIA employees announced that the invitation had incorrectly described Item 53, which should have been described as the NW¼NW¼, sec. 16, T. 1 S., R. 2 E.

On June 27, 1994, the Agency submitted the two bids to the JBC, which apparently requested that appellant be given an opportunity to meet the high bid. By letter of July 12, 1994, the Agency informed appellant that he would be granted a lease for Item 53 if he met the high bid. There is nothing in the record which indicates that a lease was ever issued to either appellant or Fegler for the NE¼NE¼ or the NW¼NW¼ of sec. 16.

On October 27, 1994, Fegler submitted an application for renewal of his lease of the NE¼NW¼ of sec. 16. The copy of his application included in the record does not show signatures of any landowners, although the application form includes a section entitled "Acceptance of Landowners," with spaces for landowner signatures.

On November 7, 1994, the JBC approved the issuance of a new lease to Fegler. Fegler's new lease, Lease 2630, was approved by the Superintendent on February 17, 1995. This lease states that it covers "Tribal & Allotted 1682: NE¼NW¼, Section 16, Township 1 South, Range 1 South, [6/] WRM, Wyoming containing 40.00 acres, more or less" and is for a term of 5 years, beginning January 1, 1995, and ending December 31, 1999.

Apparently in the belief that Item 53 on Invitation WR 94-1 was actually intended to be the NE¼NW¼ of sec. 16, i.e., the tract then leased to Fegler, appellant and his sons made several visits to the Agency, asking that appellant be awarded a lease for that tract.

On April 13, 1995, the Superintendent issued a decision, stating in part:

> The questions and concerns that your sons brought to our attention through various meetings held at the Realty Office are addressed as follows. The question regarding the Bid Advertisement

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6/ "Range 1 South" is clearly a typographical error. This part of the description should read "Range 2 East."

WR-94-1 dated May 23, 1994, as to why this tract was advertised and subsequently awarded to you. As it has been explained to your family numerous times * * * there was an error on the bid advertisement as the description was in error. There was no reason to advertise this tract when there was already an active approved lease to Mr. Fegler in place.

Appellant appealed the Superintendent's decision to the Area Director. The Area Director issued a decision on October 23, 1995. He stated:

> Based upon the facts presented by the Superintendent, the renewal of the NE¼NW¼ Section 16, T. 1 S., R. 2 E., containing 40 acres, more or less, was not proper and the agency made a description error in WR-94-1 for the NW¼NW¼ Section 16, T. 1 S., R. 2 E.
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> The administrative file did not contain any evidence that ongoing negotiations were taking place amongst the landowners in accordance to 25 C.F.R. §162.6, (NE¼NW¼) which would have authorized the Superintendent with proper authority to approve said lease, as he had done.
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> Even though the 90-day notices were mailed out properly, and the landowners did not bring in a lessee of their choice, the Superintendent shall advertise said tract in accordance to 25 C.F.R. §162.7, in the event negotiations aren't in progress.
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> Even though an error was typed on the sealed bids, advertisement No. WR-94-1, (NW¼NW¼), agency personnel verbally announced the error before publicly opening the sealed bids on June 14, 1994. However, agency personnel were at fault by not verifying the NW¼NW¼ Section 16 T. 1 S., R. 2 E., to be part of range unit No. 23. Further information verifies this particular tract has never been withdrawn from the range unit for leasing purposes. Therefore, the bids submitted by both parties were for "de facto" land that was not eligible for leasing purposes under 25 C.F.R. [Part] 162.
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> * * * * * *
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> The only problem we observed (outside of the description error) with the sealed bids, advertisement No. WR-94-1, was the fact item No. 23 allowed Shoshone and Arapahoe tribal members the right to meet the high bid on allotted and tribal lands. Tribal preference on tribal lands is authorized; however, on allotted lands, the item does not apply. Title 25 C.F.R. §162.5(c)(e) allows the lessee no preference rights to a future lease, nor shall the lease contain provisions for renewal.
>
> The Superintendent is instructed to remove such a requirement from future lease advertisements under 25 §162.7, regarding allotted lands.

> Therefore, we remand the Superintendent's decision of April 13, 1995, approving the lease on the NE¼NW¼ Section 16, T. 1 S., R. 2 E., containing 40 acres more or less, back to the Superintendent with the following instructions, (1) inform the present lessee that said tract was approved in error, (2) inform the landowners that they have the option to negotiate a lease in accordance with 25 C.F.R. §162.6, and or (3) advertise the tract as required by 25 C.F.R. §162.7 in a special advertisement for the next upcoming 1996 lease year.
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> As for the NW¼NW¼ Section 16, T. 1 S., R. 2 E., the land was ineligible for leasing purposes in the first place; therefore, there is nothing to appeal. The case is moot. Therefore, any bid deposits should be returned to the bidders, if warranted. [Emphasis in original.]

(Area Director's Oct. 23, 1995, Decision at 2-3).

Appellant appealed this decision to the Board, including arguments in his notice of appeal. Fegler filed a brief.

Discussion and Conclusions

Appellant contends that, when he bid in response to Invitation WR 94-1, he intended to and did bid on the NE¼NW¼ of sec. 16. He argues that this was the only tract in sec. 16 which fit the description given in the invitation, i.e., a tract with 21 irrigated acres, 18 range acres, and no fencing requirements. Appellant states that he was aware that the tract offered as Item 53 could not have been the NW¼NW¼ of sec. 16, as stated by the Agency employees at the bid opening, because that tract was already included in a range unit for which he was a co-lessee.

Appellant agrees with the Area Director's decision insofar as it reversed the Superintendent's approval of Lease 2630. However, he objects to the terms of the Area Director's remand to the Superintendent, contending that, in light of the Superintendent's July 12, 1994, letter, he (appellant) should immediately be awarded a lease for the NE¼NW¼ of sec. 16.

Fegler did not file a notice of appeal from the Area Director's decision, even though that decision was clearly adverse to his interests. He has however, participated in this appeal as an interested party by filing an answer brief responding to appellant's contentions. His answer brief makes it clear that he wishes to retain his lease for the entire 5-year term. For the most part, he disagrees with the Area Director's decision. However, he apparently agrees with the decision insofar as it found that the Superintendent had improperly allowed tribal members to exercise preference rights on allotted lands. 7/

7/ For this contention, Fegler cites the last sentence of 25 C.F.R. 162.7, which provides: "Advertisements * * * will not offer preference rights."

Fegler attaches to his answer brief a document signed by 14 of the individual landowners. The document states: "We the undersigned landowners of Allotment #1682 wish to continue to lease this land to Harlan Fegler. We are and have been very pleased with his care of the land."

Appellant's contention that he is entitled to an immediate lease for the NE¼NW¼ of sec. 16 must be rejected. Although appellant believed that he was bidding on the NE¼NW¼ of sec. 16, neither the invitation as printed nor the oral correction made by BIA employees described the tract as the NE¼NW¼ of sec. 16. Rather, as indicated above, the invitation described it as the NE¼NE¼ of sec. 16 and the BIA employees described it orally as the NW¼NW¼ of sec. 16.

At the time of the lease sale, a new lease for the NE¼NW¼ of sec. 16 was still subject to negotiation. 90-day letters had been sent to the landowners on March 17, 1994 (or possibly February 28, 1994)) see footnote 5, supra), informing them of their right to negotiate a new lease. Although it does not appear that any negotiations were undertaken, the 90-day period had not expired on May 23, 1994, when Invitation WR 94-1 was issued. 8/ Therefore, even if the NE¼NW¼ of sec. 16 had been included in the lease sale, its inclusion would have been in error.

Accordingly, the Board finds that appellant was not entitled to be awarded a lease for the NE¼NW¼ of sec. 16, either by virtue of his bid in response to Invitation WR 94-1 or by virtue of the Agency's July 12, 1994, letter to him. The Board affirms the Area Director's decision in this regard.

The Area Director also held that the Superintendent improperly approved a "renewal" lease to Fegler. As noted above, appellant agrees with this part of the Area Director's decision although he objects to the terms of the remand ordered by the Area Director.

As also noted above, Fegler, although directly affected by this part of the Area Director's decision, failed to appeal the decision. Accordingly, the Board might decline to address this issue at all, on the grounds that it has not been properly raised.

Under the circumstances here, however, where appellant has raised the issue at least peripherally, and where the record suggests that a partial review of the Area Director's decision is unlikely to resolve the dispute, the Board concludes that it should invoke its authority in 43 C.F.R. 4.318 in order to review the Area Director's decision in its entirety. 9/

8/ This is true whether the notices were dated Feb. 28, 1994, or Mar. 17, 1994.

9/ 43 C.F.R. 4.318 provides:

"[E]xcept as specifically limited in this part or in Title 25 of the Code of Federal Regulations, the Board shall not be limited in its scope of review and may exercise the inherent authority of the Secretary to correct a manifest injustice or error where appropriate."

In connection with his conclusion that the Superintendent erred in approving Lease 2630, the Area Director held that, because actual negotiations were not in progress at the expiration of the 90-day negotiation period, the Superintendent was required to advertise the lease under 25 C.F.R. 162.7.

25 C.F.R. 162.7 provides: "Except as otherwise provided in this part, prior to granting a lease or permit as authorized under § 162.2 the Secretary shall advertise the land for lease." 10/ However, 25 C.F.R. 162.6(c) provides: "Where the Secretary may grant leases under § 162.2 he may negotiate leases when in his judgment the fair annual rental can thus be obtained." The relationship between section 162.7 and subsection 162.6(c) is not entirely clear. The authority in subsection 162.6(c) may fall within the exception in the first clause of section 162.7. If this is the case, however, it is arguable that the mandate in section 162.7 is negated because subsection 162.6(c), on its face, is very broad. 11/

Realizing that the matter may not be entirely free from doubt, the Board finds that, at least in this case, the Superintendent was authorized to negotiate a lease on behalf of the individual landowners under 25 C.F.R. 162.6(c). Among the factors the Board takes into consideration in reaching this conclusion are: (1) the individual landowners received proper notice of their right to negotiate a lease; (2) none of the landowners objected to Fegler, the current lessee; preferred a different lessee; or asked that the lease be advertised; (3) Allotment 1682 is extremely fractionated))there are at least 96 individual owners))making negotiations by the landowners very difficult, if not impossible; (4) the Tribes, owning 16 percent, agreed to the lease to Fegler; and (5) Fegler, with whom the Superintendent negotiated, had apparently been performing satisfactorily.

Therefore, the Board reverses the Area Director's decision insofar as it held that the approval of Lease 2630 was erroneous.

The Area Director also held that the Agency had improperly included a provision in the lease advertisement allowing tribal members to meet the high bids for leases of allotted lands. Although the Area Director cited 25 C.F.R. 162.5(e) for his conclusion, that provision concerns only preference

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10/ 25 C.F.R. 162.2(a) provides:

"The Secretary may grant leases on individually owned land on behalf of: * * * (4) the heirs or devisees to individually owned land who have not been able to agree upon a lease during the three-month period immediately following the date on which a lease may be entered into; provided, that the land is not in use by any of the heirs or devisees."

11/ The Board observes that, in a proposed revision of BIA's leasing regulations published on June 17, 1996, 61 FED. REG. 30560, the role of advertising appears to be narrowed. For example, proposed 25 C.F.R. 162.11(a) provides: "If necessary to establish a fair annual rental, we [BIA] will advertise a tract of individually owned or heirship land before granting or approving a permit."

rights to future leases. 12/ It is possible that the Area Director intended to cite section 162.7, which contains a more broadly worded prohibition against the inclusion of preferences in advertisements. See footnote 7, supra.

On its face, 25 C.F.R. 162.7 appears to prohibit the preference at issue here. However, that regulation was promulgated in 1961. In the American Indian Agricultural Resource Management Act of 1993 (AIARMA), 107 Stat. 2011, Congress authorized leasing preferences for Indian operators under certain circumstances. Where there are discrepancies between a BIA regulation and a later-enacted statute, the statute controls. Prairie Island Indian Community v. Minneapolis Area Director, 25 IBIA 187 (1994), and cases cited therein.

[1] The relevant provisions of the AIARMA are codified at 25 U.S.C. § 3715. Subsection 3715(b) provides: "When authorized by an appropriate tribal resolution establishing a general policy for leasing of Indian agricultural lands, the Secretary))(1) shall provide a preference to Indian operators in the issuance and renewal of agricultural leases and permits so long as the lessor receives fair market value for his property." Subsection 3715(c)(3) provides: "The provisions of subsection (b) of this section shall not apply to a parcel of trust or restricted land if the owners of at least 50 percent of the legal or beneficial interest in such land file with the Secretary a written objection to the application of all or any part of such tribal rules to the leasing of such parcel of land."

Paragraph 23 of Invitation WR 94-1 stated:

> ON ALL TRIBAL TRACTS, BIDS WILL BE ACCEPTED FROM ENROLLED MEMBERS OF THE SHOSHONE AND ARAPAHOE TRIBES ONLY. ON ALL TRIBAL AND ALLOTTED TRACTS, MEMBERS OF THE SHOSHONE AND ARAPAHOE TRIBES HAVE THE RIGHT TO MEET THE HIGH BID. THESE TWO REQUIREMENTS ARE IN ACCORDANCE WITH THE TRIBES LEASING PROCEDURES OF ALL TRIBAL LANDS FOR FARM/PASTURE PURPOSES. THE ALLOTTED LANDS LISTED IN THIS ADVERTISEMENT, RESERVE TO THE HEIRS OWNING AN INTEREST IN SUBJECT ALLOTMENTS THE RIGHT TO MEET THE HIGH BID. [Emphasis in original.]

It appears from this statement that preferences for tribal members on the Wind River Reservation are a matter of tribal law.

Under 25 U.S.C. § 3715, the question of whether preferences may be applied in the leasing of Allotment 1682 must be answered by reference to tribal law. Tribal law controls on this point unless the landowners have objected in writing to the application of that law. It does not appear that

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12/ 25 C.F.R. 162.5(e) provides: "No lease shall provide the lessee a preference right to future leases nor shall any lease contain provisions for renewal, except as otherwise provided in this part."

25 C.F.R. 162.5(c), also cited by the Area Director, concerns bonds and appears to be totally irrelevant.

the Area Director considered either tribal law or the question of whether the owners of Allotment 1682 have objected to the application of tribal law to their land.

Therefore, the Board vacates the Area Director's decision insofar as it directed the Superintendent to delete the preference provisions for allotted lands from future lease advertisements. 13/ Because the Board vacates rather than reverses this part of the Area Director's decision, the Area Director may address this question again if necessary, perhaps in the context of a future appeal, as long as he takes the factors just discussed into consideration. Given the above holdings, however, there is no need for the Area Director to address the question again in the context of this case.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. 4.1, the Board affirms the Area Director's decision insofar as that decision held that appellant was not entitled to be awarded a lease for the NE¼NW¼ of sec. 16; reverses it insofar as it held that the award of Lease 2630 to Fegler was erroneous; and vacates it insofar as it directed the Superintendent to delete the preference provisions for allotted lands from future lease advertisements. 14/

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Anita Vogt
Administrative Judge

I concur:

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Kathryn A. Lynn
Chief Administrative Judge

13/ For purposes of this decision, the Board assumes that the preference as stated in the lease advertisement is in accordance with tribal law.

14/ Under this decision, Lease 2630 is valid and therefore, absent some future lease violation, will remain in place until it expires on Dec. 31, 1999.